

RECEIVED

SEP 25 1998

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Deployment of Wireline Services Offering
Advanced Telecommunications Capability

CC Docket No. 98-147

**Comments of the
Information Technology Association of America**

Jonathan Jacob Nadler
Brian J. McHugh
Squire, Sanders & Dempsey L.L.P.
1201 Pennsylvania Ave., N.W.
Box 407
Washington, D.C. 20044
(202) 626-6838

Counsel for the Information
Technology Association of America

September 25, 1998

No. of Copies rec'd 0+4
List ABCDE

SUMMARY

ITAA is skeptical of the claim, made by some large ILECs, that the pro-competitive regulatory requirements contained in the Telecommunications Act have deterred them from deploying broadband services necessary to provide high-speed access to the Internet and other information services. The real reason for the ILECs' failure to deploy advanced telecommunications services is that, in the absence of competition, they have no incentive to do so. The best means to promote the deployment of advanced services, therefore, is to promote competition in the local transport market.

ITAA also is concerned about the potential for monopoly abuse created by the Commission's proposal to permit the ILECs to escape their statutory unbundling and resale obligations by providing advanced services through a "truly" separate affiliate. As long as an ILEC and its affiliate are under common ownership, the ILEC will retain the incentive and ability to harm competition by engaging in cross-subsidization, discrimination, and "price squeeze" strategies. At best, structural separation can make such anti-competitive conduct harder to engage in and easier to detect.

Although the Commission's separate affiliate proposal creates a significant risk of anti-competitive abuse by the ILECs, it also holds the potential to facilitate competitive entry into the local data transport market. In particular, the Commission proposes to require the ILECs to provide service to their separate affiliates on terms and conditions that are *identical* to those on which the ILECs provide service to competing providers of advanced telecommunications services. The Commission also has advanced specific proposals regarding CLEC collocation and loop access. If properly implemented and effectively enforced, these provisions could facilitate

competitive entry. On balance, ITAA believes that, *if* the Commission strengthens the regulatory safeguards and vigorously enforces its rules, the potential pro-competitive benefits of the separate affiliate proposal will outweigh the risks of increased ILEC anti-competitive conduct. Therefore, subject to the modifications suggested herein, ITAA supports the Commission's proposal.

Strengthen the Separate Affiliate

Separation requirements. The Commission's proposed separation requirements track those contained in Section 272 of Communications Act. The Commission should reject any invitations to deviate from the regime crafted by Congress. In particular, the Commission should not substitute the far weaker separation requirements adopted as part of the *Competitive Carrier* proceeding to govern the entry of ILECs into the in-region interexchange market. The Commission, moreover, should require the ILEC to demonstrate that its advanced services affiliate is in compliance with the separation requirements *before* allowing the carrier to provide advanced services free from the Telecommunications Act's unbundling and resale requirements. To facilitate this process, the Commission should require the ILEC to submit a comprehensive separation plan to the Commission, along with an affidavit of compliance. These requirements should apply to all ILECs – regardless of size – and should remain in effect until the market for advanced services is fully competitive.

Asset transfers. ITAA does not oppose a narrowly drawn provision allowing an ILEC – for a brief, specified period – to transfer existing assets necessary to provide advanced services to its separate affiliate. To deter abuse, any transfer should be done pursuant to written agreement, in strict conformity with the Commission's established affiliate transaction rules.

Under no circumstances, however, should an ILEC be allowed to transfer essential bottleneck facilities – such as local loops – to its advanced services affiliate. The Commission also should ensure that an ILEC’s affiliate does not gain preferential access to collocation opportunities for advanced services equipment transferred from the ILEC.

Protect Information Service Competition

Non-discrimination. In many markets, at least initially, the ILEC’s advanced services affiliate may be the only provider of DSL and other advanced telecommunications services. As a result, the affiliate could engage in various forms of discrimination against unaffiliated information service providers (“ISPs”). To prevent this result, the Commission should require an ILEC advanced telecommunications services affiliate to: (1) provide services to non-affiliated ISPs on the identical terms and conditions that it provides services to the ILEC’s information services operation; (2) operate through an affiliate that is separate from the ILEC’s information services operations; and (3) provide services to all ISPs at just and reasonable rates, either pursuant to tariff or publicly available written agreement.

No bundling. In addition, the advanced services affiliate must comply with the Commission’s well-established prohibition on bundling telecommunications and information services. Specifically, the affiliate should not be allowed to require users to subscribe to the services provided by the ILEC’s information services operation. Nor should the ILEC affiliate be permitted to make “special discounts” available only to users that purchase the transmission and information services. The prohibition on bundling telecommunications and information services should apply regardless of whether the Commission classifies the ILEC advanced services affiliate as dominant or non-dominant.

Promote Competitive Provision of Advanced Services

Because the most effective means to promote the deployment of advanced services is to promote competitive entry, ITAA urges the Commission to take significant actions to facilitate entry by CLECs and other providers.

Access to loops. Increased access to loops is critical for competitive entry. The Commission should once more reaffirm its finding that the ILECs must deploy DSL compatible loops, and should issue any rules necessary to ensure prompt and full compliance with this obligation. In addition, the Commission should adopt rules to require ILECs to engage in loop spectrum unbundling. This would enable an ILEC and a CLEC to use the same loop for the simultaneous provision of voice service and high-speed data service. Finally, the Commission should require sub-loop unbundling, which – in many cases – is the only feasible means for CLECs to deploy DSL services.

Collocation. ITAA strongly supports the Commission's proposal to require ILECs to provide more flexible collocation arrangements. In particular, the Association supports the Commission's proposal to require the ILECs to maximize the space available in their premises for advanced services equipment by offering competitors "cageless" collocation arrangements.

The ITAA D-CAP proposal. ITAA has previously called on the Commission to initiate a proceeding to create a new category of service provider – Data Competitive Access Providers ("D-CAPs") – to transport packetized DSL traffic between the ILEC central office and their ISP. If the Commission authorizes the creation of D-CAPs, these carriers will need the right to receive aggregated DSL traffic, regardless of whether such traffic was originated by the

- v -

ILEC itself or the ILEC's advanced services affiliate. The Commission therefore should make clear in this proceeding that an advanced services affiliate – like any carrier – has a statutory duty to interconnect with other carriers.

TABLE OF CONTENTS

SUMMARY.....	i
INTRODUCTION.....	1
I. IF STRENGTHENED AND VIGOROUSLY ENFORCED, THE SEPARATE AFFILIATE REQUIREMENT COULD PROMOTE THE DEPLOYMENT OF ADVANCED SERVICES BY ILECs <i>AND</i> NEW ENTRANTS	3
A. ITAA has Concerns Regarding the Need For, and the Effectiveness of, the Separate Affiliate Proposal	3
B. The Commission Should Strengthen the Safeguards and Separation Requirements	7
II. THE COMMISSION SHOULD ENSURE THAT THE ADVANCED SERVICES AFFILIATE DOES NOT HARM COMPETITION IN THE INFORMATION SERVICES MARKET.....	15
III. THE COMMISSION SHOULD PROMOTE THE <i>COMPETITIVE</i> PROVISION OF ADVANCED TELECOMMUNICATIONS SERVICES	17
A. The Commission Should Adopt Its Proposals to Expand CLEC Access to Unbundled Loops and More Efficient Collocation Opportunities.....	17
B. The Commission Should Ensure That Its Separate Affiliate Rules Can Accommodate ITAA's D-CAP Proposal.....	21
CONCLUSION.....	22

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of

Deployment of Wireline Services Offering
Advanced Telecommunications Capability

CC Docket No. 98-147

**Comments of the
Information Technology Association of America**

The Information Technology Association of America ("ITAA") submits these comments in response to the Commission's *Order and Notice of Proposed Rulemaking* concerning the deployment of advanced telecommunications capabilities.¹

INTRODUCTION

ITAA is the principal trade association of the information technology industry. Together with its twenty affiliated regional technology councils, ITAA represents more than 11,000 companies located throughout the United States. ITAA's members provide the public with a wide variety of information products, software, and services. Among the most significant of these offerings are Internet access and other on-line information services.

¹ See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 98-188, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, CCB/CPD No. 98-15 (rel. Aug. 7, 1998) ("*Order & NPRM*").

Today, most subscribers connect to the Internet and other information services using circuit switched, twisted copper facilities provided by an incumbent local exchange carrier (“ILEC”). As the Commission has recognized, these facilities – which were designed for voice traffic – are ill-suited to accommodate the rapid growth in data traffic caused by the increasing use of the Internet and other information services.² Despite this fact, the ILECs have been slow to deploy advanced telecommunications capabilities, such as Digital Subscriber Line (“DSL”) and packet switched services, which can facilitate high-speed access to these services.

In adopting the Telecommunications Act of 1996, Congress recognized that promoting local telecommunications competition would spur the deployment of both conventional and advanced telecommunications services.³ For this reason, Congress obligated incumbent LECs to comply with interconnection, unbundling, resale, and collocation requirements designed to facilitate new entry. ITAA will not support any proposal that would undermine the pro-competitive goals of the Act. At the same time, however, the Association recognizes the important role that the incumbent LECs can play in the deployment of advanced services.

ITAA believes that – taken as a whole – the measures proposed in the *Notice* will foster the provision of advanced services by incumbent LECs, while facilitating entry by

² See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Notice of Inquiry, FCC 98-187, CC Docket No. 98-146, at ¶ 19 (rel. Aug. 7, 1998) (“*NOI*”).

³ See 47 U.S.C. § 157 note (If the Commission determines that advanced telecommunications services are not “being deployed to all Americans in a reasonable and timely fashion,” then the Commission “shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”).

competitive local exchange carriers (“CLECs”) into the market. However, if new entrants are to be able “to offer advanced services on an equal footing with incumbent carriers and their affiliates,”⁴ the Association believes that the Commission must modify its proposals.

Specifically:

- The Commission should strengthen the proposed separate affiliate requirement to ensure that it provides incentives for the ILECs to deploy advanced services, while still preventing anti-competitive abuse.
- The Commission should ensure that the ILEC separate affiliate does not act in a manner that limits the ability of subscribers to use the information service provider of their choice.
- The Commission should ensure that CLECs have adequate access to unbundled loops and increased collocation opportunities.

I. IF STRENGTHENED AND VIGOROUSLY ENFORCED, THE SEPARATE AFFILIATE REQUIREMENT COULD PROMOTE THE DEPLOYMENT OF ADVANCED SERVICES BY ILECs AND NEW ENTRANTS

A. ITAA has Concerns Regarding the Need For, and the Effectiveness of, the Separate Affiliate Proposal

In the *Order*, the Commission has concluded that the core requirements of the Telecommunications Act’s local competition provisions – including the statute’s interconnection, unbundling, resale, and collocation requirements – are fully applicable to the provision of advanced telecommunications services by ILECs.⁵ ITAA supports this conclusion. As explained in the *Order*, there simply is no basis on which to conclude that Congress intended to

⁴ *Order & NPRM* ¶ 14.

⁵ *See id.* at ¶¶ 45-64.

limit in any way the application of the Act's market-opening requirements to the ILECs' existing voice-oriented telecommunications networks and services.⁶ The Commission, nonetheless, has proposed to excuse the ILECs from these pro-competitive statutory obligations if they offer advanced telecommunications services through a "truly" separate affiliate.⁷

Some large ILECs claim that these statutory unbundling and resale obligations deprive them of any incentive to deploy advanced telecommunications services.⁸ ITAA is skeptical of the ILECs' attempts to blame pro-competitive regulatory requirements contained in the Telecommunications Act for their systematic failure to meet consumer demand for broadband services. The carriers' failure to deploy such services long predates the Telecommunications Act.⁹

As ITAA stated in its comments in response to the Commission's *Notice of Inquiry*, the real reason for the ILECs' failure to deploy advanced telecommunications services is that, in the absence of competition, they have no incentive to do so.¹⁰ To the contrary, the ILECs

⁶ See *id.*

⁷ *Id.* at ¶ 83.

⁸ See *Petition of Bell Atlantic for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket No. 98-11 (filed Jan. 26, 1998); *Petition of U S West for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket No. 98-26 (filed Feb. 25, 1998); *Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Capabilities*, CC Docket No. 98-32 (filed March 5, 1998).

⁹ For example, Integrated Services Digital Network ("ISDN") technology has been available since the 1980s, yet the ILECs have failed completely to make this service available to consumers. See Kevin Werbach, Office of Plans and Policy, Federal Communications Commission, *"Digital Tornado: The Internet and Telecommunications Policy,"* at 76 (Mar. 1997) ("[D]espite growing interest in ISDN as an Internet access technology, only a relatively small number of customers have ISDN lines in service. According to one study, approximately 1.4% of modem users connected to the Internet using ISDN in early 1996.").

¹⁰ See *Comments of the Information Technology Association of America*, CC Docket No. 98-146 (filed Sept. 14, 1998).

have a strong economic incentive *not* to invest in advanced technologies.¹¹ The best way to counter this disincentive, the Association explained in its comments, is to introduce competition in the local data transport market. As demonstrated by a growing body of evidence, ILECs are more likely to offer advanced telecommunications services when confronted with the prospect of losing customers to a rival carrier that provides such services at cost-based rates.¹²

ITAA also is concerned about the potential for monopoly abuse created by the Commission's proposal to permit the ILECs to depart from the competitive course charted by Congress. As long as an ILEC and its affiliate are under common ownership, the ILEC will retain the incentive and ability to leverage its control over the local loop and other essential facilities to harm competition by engaging in cross-subsidization and discrimination.¹³ The

¹¹ For many years, ILECs have met the needs of large business customers for high-speed data transport service by providing them with T-1 lines that are customarily offered at rates substantially in excess of cost. Promoting the use of advanced services like ISDN and DSL would provide these business customers with a low-cost alternative to T-1 facilities and, as a result, "cannibalize" the ILECs' lucrative T-1 business. *See* Economics and Technology, Inc., *The Effect of Internet Use on the Nation's Telephone Network*, at 15 (Jan. 22, 1997).

¹² For example, SBC did not make DSL service available in the San Francisco Bay area until May 1998 – six months after Covad Communications, a data-oriented CLEC, started offering DSL service in this market. Similarly, U S West first deployed its DSL service in Phoenix in June 1998 – seven months after Cox Cable introduced its high-speed cable modem service.

¹³ There is evidence that the ILECs have begun to use their control over advanced services in a manner that harms competition in the information services market. For example, the Minnesota Attorney General and Public Service Department recently filed a complaint with the State public utility commission alleging that US West has provided its "Megabit" DSL service to its non-regulated Internet access service provider affiliate, US West.Net, on terms and conditions that were more favorable than those on which the carrier provides this service to non-affiliated ISPs. *See* Knight-Ridder Tribune Business News (Sept. 11, 1998); *see also* *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384, 466-67 (1980) (subsequent history omitted) ("*Computer II Final Order*") (explaining that large monopoly carriers have the incentive to extend their monopoly into the enhanced services market through "either (1) denial of access to the 'bottleneck' *i.e.*, local exchange and toll transmission facilities or (2) cross-subsidization from the monopoly service to the competitive enhanced . . . markets."); *Commission's Investigation into Southern Bell Tel. And Tel. Company's Trial Provision of MemoryCall Service*, Docket No. 4000-U (Ga. PSC June 4, 1991) (finding that BellSouth used its control over the local exchange to hamper competitors in the voice messaging market); *see also* *Comments of the Information*

ILECs also may engage in “price squeeze” strategies.¹⁴ At best, structural separation can make such anti-competitive conduct harder to engage in and easier to detect. However, as ITAA’s members have learned from experience, no separate affiliate requirement – no matter how well conceived – can prevent monopoly abuse. The Association, moreover, believes that the separation requirements proposed by the Commission suffer from several shortcomings that could further diminish the agency’s ability to deter and detect ILEC anticompetitive conduct in the developing market for advanced telecommunications services.

Although the Commission’s separate affiliate proposal creates a significant risk of anticompetitive abuse by the ILECs, it also holds the potential to facilitate competitive entry into the local data transport market. In the *Notice*, the Commission has proposed to require the ILECs to provide service to their separate affiliates on terms and conditions that are *identical* to those on which the ILECs provide service to competing providers of advanced telecommunications services.¹⁵ If properly implemented and effectively enforced, the non-discrimination requirement could create genuine incentives for the ILECs to offer competing providers unbundled network elements, services for resale, and collocation opportunities at reasonable rates, terms, and conditions. On balance, ITAA believes that, *if* the Commission strengthens the regulatory safeguards and vigorously enforces its rules, the potential pro-

Technology Association of America, CC Docket No. 95-20, at 48-54 (filed Apr. 7, 1995) (detailing instances of ILEC anticompetitive conduct).

¹⁴ For example, an ILEC could set the price for the local loop significantly above cost. Even if the ILEC charged the same price for this facility to its advanced services affiliate and non-affiliated providers, the ILEC would enjoy a competitive advantage. The ILEC advanced services affiliate could treat this charge as an intra-corporate transfer and absorb the cost. By contrast, the non-affiliated advanced services provider would have no choice but to pass this cost on to its customers.

competitive benefits of the separate affiliate proposal will outweigh the risks of increased ILEC anti-competitive conduct. Therefore, subject to the modifications suggested herein, ITAA supports the Commission's proposal.

B. The Commission Should Strengthen the Safeguards and Separation Requirements

As noted above, the Commission has long recognized that the ILECs have the ability and incentive to leverage their loop monopoly into the downstream market for information services.¹⁶ To deter and detect similar conduct in the advanced services market, the Commission should strengthen the nondiscrimination, separations, asset transfer, and non-dominant carrier regulatory requirements proposed in the *Notice*.

1. Non-discrimination requirement

Of all the competitive safeguards proposed in the *Notice*, the single most important is the requirement that the ILECs treat their own advanced services affiliate and independent providers of advanced services with absolute equality.¹⁷ This non-discrimination requirement will serve two important purposes. First, it will limit the ability of an ILEC to give its advanced services affiliate an unfair competitive advantage. Second, it will create an incentive for the ILECs to comply with the Telecommunications Act's interconnection, unbundling, resale, and collocation requirements.

¹⁵ See Order & NPRM ¶ 96.

¹⁶ See *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd 23891, 24004 (1997) ("*Foreign Participation Order*") (explaining that a monopoly carrier has the ability to "use its market power in an upstream market in the United States (*i.e.*, local exchange and exchange access services) to harm competition in the downstream market (*i.e.*, enhanced services . . .)");

¹⁷ See Order & NPRM ¶ 96.

If an ILEC itself provides advanced telecommunications services, it will directly benefit from delays, high prices, or other unreasonable terms and conditions that it imposes on CLECs that seek to provide competing service using ILEC-provided UNEs. As a result, the ILEC has little, if any, incentive to comply with its unbundling obligations. Requiring the ILEC's advanced services affiliate to purchase loops and other UNEs from the ILEC on the same footing as competing service providers, however, will provide the ILEC with a strong incentive to provide UNEs to *all* providers on a prompt, reasonable, and non-discriminatory basis.¹⁸

In order to make it easier to monitor and enforce ILEC compliance with their obligation to provide all providers of advanced services with absolute equality, the Commission should require the ILECs to negotiate interconnection agreements with their advanced services affiliates, and to make such agreements publicly available. Competing advanced services providers should then have an absolute right to obtain services pursuant to the rates, terms and conditions contained in the ILEC-affiliate agreement.

2. Separation requirements

The Commission's rules should ensure that an incumbent LEC does not use its control over loops and other essential facilities to place competing advanced services providers at an unfair disadvantage. To do so, the Commission should: require the ILEC and its advanced services affiliate to maintain strict structural separation; require the ILEC to file a separation plan before providing advanced services through a separate affiliate; apply the separation

¹⁸ See *id.* at ¶ 86.

requirements to all ILECs, regardless of their size; and maintain the separation requirement until the market for advanced telecommunications services is fully competitive.

Appropriate Level of Separation. The Commission's proposed separation requirements track those adopted by Congress in Section 272 of Communications Act.¹⁹ That section reflects Congress' conclusion as to the level of separation necessary to deter an ILEC from using its monopoly power to place an affiliated service provider at an unfair competitive advantage. The Commission should reject any invitations to deviate from the regime crafted by Congress.²⁰

In particular, the Commission should not substitute the far weaker separation requirements adopted, as part of the *Competitive Carrier* proceeding, to govern the entry of ILECs into the in-region interexchange market.²¹ The separation requirements adopted in that proceeding were designed to govern ILEC entry into an existing, competitive market. As a result, the danger that the ILEC could use its monopoly position to harm competition in the adjacent market was more limited. In the present case, by contrast, the ILEC separate affiliate may be the most significant (and, in many markets, the only) provider of advanced telecommunications services. The greater risk of competitive harm posed by ILEC

¹⁹ See 47 U.S.C. § 272.

²⁰ As ITAA demonstrated in its comments in the *Computer III Further Remand* proceeding, nothing less than strict structural separation can effectively deter and detect any ILEC anticompetitive activities. See *Comments of the Informational Technology Association of America*, CC Docket Nos. 95-20, 98-10 at 11-16 (filed mar. 27, 1998).

²¹ See *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 98 F.C.C.2d 1191 (1984).

discrimination in favor of such an affiliate warrants application of the higher degree of separation proposed in the *Notice*.

Commission pre-certification. Before allowing an ILEC to provide advanced services free from the Telecommunications Act's unbundling and resale requirements, the Commission should require the carrier to demonstrate that its advanced services affiliate is in compliance with the separation requirements discussed above. Specifically, the ILEC should be required to submit a comprehensive separation plan to the Commission, along with an affidavit of compliance. Taken together, these submissions should set forth in an organized and direct fashion the information necessary for the Commission to determine whether the ILEC and the separate affiliate satisfy applicable separation requirements.

In order to avoid unnecessary delay, the Commission – after a thorough and complete review of the ILEC's filing – should issue an order setting forth its findings on an expedited basis. If the Commission fails to do so within 90 days, the separation plan should be allowed to go into effect.²² To aid in the detection of any ILEC anticompetitive conduct, the Commission should require the ILECs to file periodic reports and certifications.²³ In the event of ILEC non-compliance, the Commission should impose significant penalties.

²² This should not, however, constitute a binding finding that the plan is lawful any more than allowing a tariff to go into effect precludes a subsequent finding of illegality.

²³ In the international context, the Commission requires U.S. carriers subject to structural separation requirements to file periodic reports summarizing all basic services and facilities procured from their dominant foreign affiliate. As the Commission has explained, "[t]he provisioning and maintenance of services and facilities necessary for the provision of [service] . . . can be a primary source of non-price discrimination by which a foreign carrier with market power can degrade unaffiliated U.S. carriers' quality of service. We find that a reporting requirement will allow unaffiliated carriers to monitor and detect whether U.S. carriers are receiving favorable treatment from their foreign carrier affiliates and to notify the Commission if undue discrimination exists." *Foreign Participation Order*, 12 FCC Rcd at 24016. The imposition of a periodic reporting requirement on the ILECs and their advanced

Applicable to all ILECs. As a matter of law, the Commission must apply the separate affiliate requirement to *all* ILECs, regardless of their relative size. In the *Order*, the Commission determined that the Telecommunications Act's interconnection, unbundling, resale, and collocation requirements apply to the ILEC provision of advanced telecommunications services.²⁴ Accordingly, the Commission may only permit an ILEC to provide advanced telecommunications services free from these statutory requirements through a separated advanced services affiliate.²⁵ Moreover, as a matter of policy, it makes sense to apply the separate affiliate requirement to all ILECs. Like large ILECs, small ILECs retain monopoly power and, therefore, can impede competition.²⁶ Indeed, in many cases, it may be even more important to require small ILECs – many of which are in less densely populated areas – to comply with the separation requirements because they are less likely to face effective competition.

Competition-based sunset. ITAA recognizes the need for the Commission to eliminate regulatory requirements that have out-lived their usefulness. Because of the significant

services affiliates would similarly aid in the detection and prevention of anticompetitive conduct in the advanced services market.

²⁴ See *Order and NPRM* ¶ 32.

²⁵ While the Commission cannot excuse an ILEC from compliance with the Telecommunications Act's interconnection obligations, a rural LEC with fewer than two percent of the nation's subscriber lines can still petition a state commission for an exemption from these requirements. See 47 U.S.C. § 251(f). In addition, rural telephone companies that do not receive an interconnection request that is determined to be reasonable by a state commission will remain exempt from the Act's interconnection obligations. *Id.* at § 251(f)(1).

²⁶ See *Order and NPRM* ¶ 98. In the international context, the Commission has rejected the notion that the "relevant size" of an incumbent monopolist "should diminish our finding that . . . safeguards are warranted where the . . . affiliate has sufficient market power to affect competition adversely." *Foreign Participation Order*, 12 FCC Rcd at 23996.

uncertainty regarding the future development of the advanced services market, however, the Commission should not adopt an automatic sunset provision for the separate affiliate requirement. Rather, the Commission should commit itself to revisiting periodically the state of competition in the advanced services market.²⁷ Until the agency determines that this market is fully competitive, the separation requirements should be retained.

3. Asset transfers

The *Notice* seeks comment regarding the rules that should govern any transfer of assets between the ILEC and its advanced services affiliate.²⁸ In fashioning these rules, the Commission must balance two potentially conflicting goals. On the one hand, the Commission should facilitate the speedy deployment of advanced services. On the other hand, the Commission must ensure that the ILEC's advanced services affiliate does not obtain an unfair competitive advantage.

In order to balance these concerns, ITAA does not oppose a narrowly drawn provision allowing an ILEC – for a brief, specified period – to transfer existing assets necessary to provide advanced services to its separate affiliate. At the same time, however, any transfer should be done in a manner that does not provide the advanced services affiliate with an undue advantage. Therefore, as the Commission has proposed, any transfer should be done pursuant to written agreement, in strict conformity with the Commission's established affiliate transaction rules.²⁹

²⁷ See *Order & NPRM* at ¶ 99.

²⁸ See *id.* at ¶ 104.

²⁹ See *id.* at ¶ 111.

Under no circumstances, however, should an ILEC be allowed to transfer essential bottleneck facilities – such as local loops – to its advanced services affiliate. Indeed, permitting an ILEC to do so would defeat the whole purpose the separate affiliate regime proposed in the *Notice*.³⁰ As explained in the *Notice*, “any transfer of local loops from an incumbent LEC to an advanced services affiliate would make the affiliate an *assign* of the incumbent LEC.”³¹ Because an “assign” falls within the definition of an incumbent LEC,³² the transfer of a local loop would render the separate affiliate an ILEC and thus trigger the Act’s interconnection, unbundling, resale, and collocation requirements.

The Commission also should ensure that an ILEC’s affiliate does not gain unfair access to collocation opportunities for advanced services equipment transferred from the ILEC. For example, if an ILEC were to transfer to its advanced services affiliate equipment located in a central office where the collocation space has already been exhausted, CLECs seeking to provide advanced services in competition with the ILEC affiliate would be required to pursue less efficient and potentially more costly collocation arrangements. To ensure that CLECs are not placed at such a disadvantage, the Commission should make clear – as it has proposed to do for switching equipment – that an ILEC advanced services affiliate will not be allowed to collocate its advanced services equipment at the ILEC’s premises if there is only room for one carrier to do

³⁰ See *id.* at ¶ 95.

³¹ *Id.* at ¶ 107 (emphasis added).

³² Section 251(h) defines an incumbent LEC as either a member of NECA as of the date the Telecommunications Act of 1996 was enacted or a “successor or assign” of such a member. 47 U.S.C. § 251(h)(1).

so.³³ Such a rule would provide a strong incentive for the ILEC to make additional space available for collocation

4. Non-dominant carrier regulation

The Commission has tentatively concluded that an ILEC's advanced services affiliate should be classified as non-dominant. Under this approach, the affiliate would not be required to provide service pursuant to tariff.³⁴ This proposal raises significant concerns.

In many markets, at least initially, the ILECs' advanced services affiliate may be the only provider of DSL and other advanced telecommunications services. As a result, the affiliate could engage in various forms of discrimination against unaffiliated information service providers ("ISPs"). For example, the advanced services affiliate could provide DSL service to the ILEC's information services operations on prices, terms, and conditions that are better than those offered to independent ISPs. To deter such conduct, the Commission – at a minimum – should specifically require the advanced services affiliate to file copies of all contracts with the Commission, pursuant to Section 211 of the Communications Act.³⁵ Such "pricing transparency" will significantly reduce the risk of discriminatory conduct. The affiliate, of course, would be subject to the requirements of Section 201 and 202 of the Communications Act.

³³ See *Order & NPRM* ¶ 131.

³⁴ See *id.* at ¶ 100.

³⁵ See 47 U.S.C. § 211.

II. THE COMMISSION SHOULD ENSURE THAT THE ADVANCED SERVICES AFFILIATE DOES NOT HARM COMPETITION IN THE INFORMATION SERVICES MARKET

ITAA expects that an ILEC advanced services affiliate will provide advanced services to both the ILEC's own information services operation as well as to unaffiliated ISPs. These providers, in turn, will offer subscribers competing service packages that combine both advanced telecommunications and information service capabilities. Because the ILEC advanced services affiliate may be the only provider of DSL and other advanced services in most markets, unaffiliated ISPs will remain almost totally dependent on the ILEC affiliate for the advanced services they need to provide customers with competitive service packages. As a result, the ILEC advanced services affiliate will have both the incentive and ability to provide the ILEC's information services operation with an unfair and anticompetitive advantage.

An ILEC advanced services affiliate could do so in a number of ways. For example, the ILEC advanced services affiliate could:

- Discriminate in favor of the ILEC's information services operation by providing it advanced services that are superior in quality, and lower in cost, than services that the affiliate provides to non-affiliated ISPs and their customers;
- Cross-subsidize the ILEC's information services operation by over-allocating joint costs to regulated advanced services, or under-pricing goods or services that the ILEC advanced services affiliate provides to the ILEC information service operation;
- Execute a price squeeze by setting a high rate for advanced services provided to unaffiliated ISPs and having the ILEC's information services operation set a low rate for services offered to customers, thereby forcing unaffiliated ISPs either to lose money matching the ILEC's low rates for information services or lose customers; or

- Subject unaffiliated ISPs to unfair pricing pressure by charging above-cost rates for advanced telecommunications services, knowing that the ILEC's information services operation would be able to absorb the charge as an intra-corporate transfer, while non-affiliated ISPs would be required to treat the service charge as a real cost that must be passed on to customers.

If permitted, such anticompetitive conduct would place non-affiliated ISPs at an insurmountable competitive disadvantage. To prevent this result, the Commission should require an ILEC advanced telecommunications services affiliate to: (1) provide services to non-affiliated ISPs on the identical terms and conditions that it provides services to the ILEC's information services operation; (2) operate through an affiliate that is separate from the ILEC's information services operations; and (3) provide services to all ISPs at just and reasonable rates, either pursuant to tariff or publicly available written agreement.

ITAA is especially concerned that the advanced services affiliate comply with the Commission's well-established prohibition on bundling telecommunications and information services.³⁶ Specifically, the affiliate should not be allowed to require users to subscribe to the services provided by the ILEC's information services operation. Nor should the ILEC affiliate be permitted to make "special discounts" available only to users that purchase the transmission and information services. The prohibition on bundling telecommunications and information services should apply regardless of whether the Commission classifies the ILEC advanced services affiliate as dominant or non-dominant. The advanced service affiliate, of course, may offer "one stop shopping," in which it puts together packages of advanced services and information services, provide each component is separately priced and separately available.

³⁶ See *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)* Final Decision, 77 F.C.C.2d 384, 475 (1980) (subsequent history omitted) ("*Computer II Final Order*").

III. THE COMMISSION SHOULD PROMOTE THE *COMPETITIVE* PROVISION OF ADVANCED TELECOMMUNICATIONS SERVICES

As recognized in the *Notice*, the deployment of advanced telecommunications services will permit millions of Americans to realize the promise of the Internet and other information services.³⁷ Experience has demonstrated conclusively that the best way to facilitate such deployment is to adopt, and vigorously enforce, a regulatory regime that promotes *competitive* entry into the local data transport market. ITAA therefore supports the measures proposed in

A. The Commission Should Adopt Its Proposal to Expand CLEC Access to Unbundled Loops and More Efficient Collocation Opportunities

ITAA welcomes the Commission's proposals to increase loop access for CLECs. However, to ensure that competing providers have access to all of the loop functionalities that they need to provide advanced services, the Commission also should require ILECs to provide loop spectrum unbundling and sub-loop unbundling. In addition, the Commission should adopt its proposals to require ILECs to permit more flexible collocation arrangements and, in particular, to permit "cageless" collocation of advanced services equipment.

1. Increased loop access

Access to DSL-compatible loops. The Association is pleased that the Commission has reaffirmed its decision, in the *Local Competition Order*, to require ILECs to make "DSL-compatible loops" available to CLECs on an unbundled and nondiscriminatory

³⁷ See *Order & NPRM* ¶ 7.

basis.³⁸ As explained in the *Notice*, such access to these essential bottleneck facilities is necessary “to promote the deployment of advanced telecommunications capability to all Americans.”³⁹ Contrary to this goal, however, some of the ILECs have resisted compliance with their statutory obligation to provide competing providers with unbundled access to DSL-compatible loops. Indeed, Bell Atlantic has filed a petition for reconsideration in this very docket seeking to re-open the loop issue.⁴⁰ The Commission should once more reaffirm its finding that the ILECs must deploy DSL compatible loops, and should issue any rules necessary to ensure prompt and full compliance with this obligation

Loop spectrum bundling. In addition, the Commission should adopt rules to require ILECs to engage in loop spectrum unbundling. This would enable an ILEC and a CLEC to use the same loop for the simultaneous provision of voice service and high-speed data service. Such usage will provide significant pro-competitive benefits to consumers. First, unbundling loop spectrum will facilitate entry into the local market by CLECs that want to provide high-speed data, but not voice, services. Second, loop spectrum unbundling will enable users that want to retain their ILEC for voice service, but do not want to obtain a second data-only loop, to obtain high speed access to information services from a CLEC.

³⁸ *Id.* at ¶ 52.

³⁹ *Id.*

⁴⁰ See *Petition of Bell Atlantic for Partial Reconsideration or, Alternatively, for Clarification*, CC Docket No. 98-147 (filed Sept. 8, 1998).

Subloop unbundling. Finally, the Commission should require sub-loop unbundling, which – in many cases – is the only feasible means for CLECs to deploy DSL service.

The deployment of DSL technology requires that a specialized modem be placed at the data customer's premises and that a paired device be located in the ILEC's network. As recognized in the *Notice*, ILECs are increasingly deploying concentration devices at remote terminals (such as digital loop concentrators) in their networks between the customer's premises and the customer's serving end-office.⁴¹ These devices are used to aggregate subscriber traffic for transmission to the carrier's end-office over fiber-based common transmission facilities. Technology is now being developed that would allow the ILEC (or its affiliate) to provide DSL service by placing a line card in the remote terminal device. If the ILEC is not required to unbundle its loops into sub-elements, and allow the collocation of equipment at the remote terminal, then competitive LECs will be precluded from providing DSL services to the increasing number of potential data customers served by loops that pass through remote terminals.⁴²

⁴¹ See *Order & NPRM* ¶ 165.

⁴² Requiring the CLEC to obtain a full loop as a UNE is generally not a viable alternative. DSL equipment can only operated properly if it is connected by a transmission line that does not exceed certain maximum lengths. Because a significant number of customer loops exceed these lengths, installation of DSL equipment in ILEC end offices often is inadequate. In other instances, the length of the loop leads to a degradation in transmission quality, *i.e.*, the longer the loop, the lower the bandwidth. For example, if the ILEC affiliate is allowed to place a line card at an RT that is 1,000 feet from the customer's premises, it can provide service to customers with a data rate of 6 million bits

2. Collocation

ITAA strongly supports the Commission's proposal to require ILECs to provide more flexible collocation arrangements. In particular, the Association supports the Commission's proposal to require the ILEC's to maximize the space available in their premises for advanced services equipment by offering competitors "cageless" collocation arrangements.⁴³

The provision of advanced services, such as DSL, requires the collocation of equipment, such as a DSLAM, in every central office that serves an end-user. Today, many ILECs require CLECs to segregate CLEC-deployed equipment in a locked "cage." While these facilities provide no discernible benefit to the ILEC, they cost the CLEC anywhere from \$60,000 to \$100,000 to construct. The high cost of placing equipment "behind bars" in multiple end-offices makes it economically inefficient for CLECs to provide service in many markets. This is especially true in less densely populated areas. Requiring the ILECs to provide cageless collocation would significantly reduce the cost of entry, thereby allowing CLECs to bring the benefits of competition to many potential data customers.

B. The Commission Should Ensure That Its Separate Affiliate Rules Can Accommodate ITAA's D-CAP Proposal

ITAA has previously called on the Commission to initiate a proceeding to create a new category of service provider – Data Competitive Access Providers ("D-CAPs") – to

per second. If the CLEC is required to place a DSLAM in a central office located 20,000 feet from the customer's premises, the fastest possible data rate that it could provide would be 144 *thousand* bits per second.

⁴³ *Order & NPRM* ¶ 137.

transport packetized DSL traffic between the ILEC central office and their ISP.⁴⁴ Under this proposal, an ILEC would be obligated to hand-off aggregated DSL traffic to a D-CAP either at the ILEC's remote terminal or central office.⁴⁵ The D-CAP would then transport this traffic to the ISP's premises over a competitively provided local packet network.

This approach would allow D-CAPs to provide advanced packet transport service to ISPs without having to provide DSL-based loops to end-users. By lowering the cost of entry, this approach would encourage companies to offer advanced telecommunications services. Moreover, by separating the provision of loop service from the provision of local packet transport, it would reduce the ability of the incumbent LECs to use their control over DSL-based loops to discriminate in favor of their information services affiliates and against non-affiliated ISPs.

If the Commission authorizes the creation of D-CAPs, these carriers will need the right to receive aggregated DSL traffic, regardless of whether such traffic was originated by the ILEC itself (if the ILEC provides DSL service on an integrated basis) or the ILEC's advanced services affiliate. The Commission therefore should make clear in this proceeding that an advanced services affiliate – like any carrier – has a statutory duty to interconnect with other carriers.⁴⁶

⁴⁴ See *Comments of the Information Technology Association of America*, CC Docket No. 98-146, at 8-10 (filed Sept. 14, 1998); *Comments of the Information Technology Association of America*, CC Docket Nos. 95-20, 98-10, at 30-31 (filed Mar. 27, 1998).

⁴⁵ For this service, the ILEC would be required to charge the D-CAP a cost-based interconnection rate that reflects its cost to: (1) strip off voice traffic (if required); (2) packetize and multiplex the data traffic onto the D-CAP's trunks so that the D-CAP can carry the traffic on its own high-capacity packet network; and (3) physically interconnect with the D-CAP. To deter discrimination, the incumbent LECs would be required to charge the same rate when it hands this traffic off to its information service affiliate.

⁴⁶ See 47 U.S.C. § 251(a).

CONCLUSION


Although the Commission's separate affiliate proposal creates a serious risk of anticompetitive abuse by the ILECs, it also holds the potential to facilitate competitive entry into the local data transport market. On balance, ITAA believes that the potential pro-competitive benefits of the proposal outweigh the risks. However, to ensure that the ILECs and their advanced services affiliates do not harm competition, the Commission should modify the separate affiliate requirement and nondiscrimination safeguards proposed in the *Notice*. In particular, the Commission should: (1) strengthen the proposed separate affiliate requirement to ensure that it provides incentives for the ILECs to deploy advanced telecommunications services while still preventing anti-competitive abuse; (2) ensure that the ILEC separate affiliate does not

act in a manner that limits the ability of subscribers to use the information service provider of their choice; and (3) adopt its proposal to provide CLECs with access to unbundled loops and increased collocation opportunities.

Respectfully submitted.

INFORMATION TECHNOLOGY ASSOCIATION
OF AMERICA

By:



Jonathan Jacob Nadler
Brian J. McHugh
Squire, Sanders & Dempsey L.L.P.
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 626-6838

Counsel for the Information
Technology Association of America

September 25, 1998